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Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1520

FRANK KIRKPATRICK,
Petitioner,

v.

THE STATE OF WISCONSIN
(Department of Natural Resources),
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, State of Wisconsin (Department of Natural Resources), respectfully prays that this court not issue its writ of certiorari to the Supreme Court of Wisconsin to review its decision entered in this matter January 4, 1972, and its denial of rehearing thereof entered February 29, 1972 (*Kirkpatrick v. State* (1971), 53 Wis. 2d 522, 192 NW 2d 856).

QUESTION PRESENTED FOR REVIEW

Does Wisconsin's evidentiary rule originally announced in *Blick v. Ozaukee County,* /[1] and reaffirmed in *Kirkpatrick v. State of Wisconsin,* /[2] now on petition for Certiorari to the United States Supreme Court, which rule prevents the introduction of evidence of the negotiated price paid by a condemnor for another parcel (or portion thereof) of real estate create an unreasonable classification in violation of the Fourteenth Amendment to the United States Constitution?

/[1] (1923), 180 Wis. 45, 192 N.W. 380.

/[2] (1971), 53 Wis. 2d 522, 192 N.W. 2d 856.

WISCONSIN STATUTORY PROVISIONS INVOLVED

Section 32.05 (2), Wisconsin Statutes:

"(2) APPRAISAL. The condemnor shall cause at least one, or more in his discretion, appraisal to be made of all property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or his personal representative, if reasonably possible."

Section 32.05 (2a), Wisconsin Statutes:

"(2a) NEGOTIATION. Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor is authorized to contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 as may be applicable to the property in one or more instalments on such conditions as the condemnor and property owners may agree."

Section 32.09 (6), Wisconsin Statutes:

"(6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right of way without cost to abutting lands."

Section 32.09 (8), Wisconsin Statutes:

"(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

(a) Highest and best use of the property.

(b) Applicable zoning.

(c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.

(d) Severance damage, if any.

(e) Maps and pictures to be used.

(f) Costs of reproduction less depreciation and rate of depreciation used.

(g) Statements of capitalization of income where used as a factor in valuation, with supporting data.

(h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.

(i) A recitation of all damages claimed by owner.

(j) Qualifications and experience of witnesses offered as experts."

Section 32.19, Wis. R.S. [1967] (printed in Respondent's appendix, pursuant to para. (c) of Rule 40, of the United States Supreme Court Rules: 1970 Revision).

Section 32.19, Wis. Stats., as amended by chs. 103 and 244, Laws of 1971 (printed in Respondent's appendix, pursuant to para. (c) of Rule 40, of the United States Supreme Court Rules: 1970 Revision).

STATEMENT OF THE CASE

Respondent, State of Wisconsin, does not entirely agree with petitioner's statement of the case. Therefore, in accordance with paragraph 3 of Rule 40 of the Supreme Court Rules (1970 Revision), respondent will adopt all of petitioner's statement of the case except the last paragraph, and respondent corrects certain inaccuracies and omissions appearing in the last paragraph of petitioner's statement of the case, as follows:

(1) Wisconsin law does not require independent appraisal of the property to be acquired.

Section 32.05 (2), Wis. Stats., /3 only requires than an appraisal be made. It does not require an independent

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/3 (2) APPRAISAL. The condemnor shall cause at least one, or more in his discretion, appraisal to be made of all property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or his personal representative, if reasonably possible.

appraisal, and in fact, a very substantial number of pre-condemnation appraisals are staff (State of Wisconsin employes) appraisals, — not independent appraisals.

(2) Wisconsin's statutory direction for negotiations with the property owner prior to condemnation/[4] provides that the condemnor may negotiate sec. 32.09, Wis. Stat. items and sec. 32.19, Wis. Stat. items. While sec. 32.09 items cover the traditional items or consdierations, that reach the determination of the fair market value issue (including severance damages in the case of a partial taking), sec. 32.19 items cover remuneration to the landowner that has no bearing on fair market value. Section 32.19, Wis. R. S. [1967]/[5] items include (1) realignment of personal property, (2) removal of personal property to another site, (3) refinancing costs, including (a) reasonable fees, (b) reasonable commissions, (c) discounts, (d) surveying costs, (e) title evidence costs, and (f) increased interest costs, (4) net rental loss, and (5) expense of plans rendered useless.

Currently, sec. 32.19, Wis. Stats., /[6] closely parallels Title II of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, P.L. 91-646, 84 Stat. 1894. Section 39.19, Wis. Stats., and now provides for reimbursement for personal or family moving expenses, loss of personal property as a result of moving or discontinuing a business or farm operation, reasonable expenses occurred in searching

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/[4] (2a) NEGOTIATION. Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor is authorized to contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 as may be applicable to the property in one or more instalments on such conditions as the condemnor and property owners may agree.

/[5] Controlling at the time of the trial of the case. This section is set forth in its entirety on Page(s) 201-202 of Respondent's Supplemental Appendix.

/[6] Section 32.19, Wis. Stats., as amended by chs. 103 and 244, Laws of 1971, appears on pages 203 through 211 of Respondent's Supplemental Appendix.

for replacement business or farm, replacement housing supplemental payments, refinancing costs, including increased interest payments, expenses incidental to the transfer of property, including recording fees, transfer taxes, penalty costs, cost of realignment of personal property on the same site in the case of partial takings, expenses incurred for plans and specifications rendered useless, reasonable net rental losses, and cost of fencing reasonably necessary.

Additionally, as already noted, under sec. 32.09 (6), Wis. Stats., a negotiated price must include severance damages to the remainder in the case of a partial taking./[7]

Finally, neither the negotiations for purchase nor the final negotiated price must be based upon the appraisal or appraisals.

(3) Section 32.09 (8), Wis. Stats., is a non-mandatory provision for the exchange of appraisal information in the discretion of the condemnation commission or trial court.

/[7] (6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right of way without cost to abutting lands.

ARGUMENT

Valid reasons support Wisconsin's rule excluding as incompetent evidence of the negotiated settlement for other parcels of real estate paid by an entity possessing the power of eminent domain. Among these reasons are:

(1) The negotiated price may be more than fair market value so that the condemnor can buy off the bother, time and expense of going through the eminent domain process, including litigation.

(2) The negotiated price may be more than fair market value since it may include payment for sec. 32.19, Wis. Stat. items, Wisconsin's counterpart to Title II of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894.

(3) The negotiated price, in the case of a partial taking, almost always includes severance damages to the remaining parcel. Since severance damages are highly subjective and speculative, and totally indigenous to the parcel to which they apply, the probative value of such evidence of a negotiated price as applied to another situation, in this case, the parcel under appraisement, is not only questionable, but in many instances probably will be misleading. At best, consideration of such evidence would require a complete trial of the proper consideration and relevancy of severance damages in the proffered settlement price.

(4) The exclusionary rule does not produce an ultimate legal or factual conclusion. It excludes only the settlement negotiation of land transfers to entities having the power of eminent domain. All other evidence is still admissible (unless inadmissible for some other reason), including expert opinion evidence, regular fair market sales, etc.

(5) An entity possessing the power of eminent domain usually is not free to shop around for a piece of property, and be competitive as may ordinary buyers. Usually, the public or quasi-public buyer *needs* a particular piece of property or properties for a project.

(6) Insofar as the exclusion of appraisal opinion evidence based upon (in part) the negotiated price paid by an entity possessing the power of eminent domain, the appraiser may very well (but not always) be basing his opinion upon an opinion of another appraiser who is not in the courtroom and subject to cross-examination.

For these principal reasons set forth above, Wisconsin's exclusionary rule is not arbitrary, but rather is based upon rationally valid considerations.

This rule has been recognized in other jurisdictions and appears to be the majority rule. See 85 A.L.R. 2d 110, 163, para. 10, "Sale[s] to Perspective Condemnor[s]." Jurisdiction espousing the majority rule are the Fifth and Third United States Courts of Appeals, the Federal District Court for Missouri, Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming.

Further cogent argument for the propriety of Wisconsin's exclusionary rule is set forth in 4 Nichols, *Eminent Domain, Settlements,* pp. 12-142 to 12-144, sec. 12.3113[2]:

> "The reasoning which forbids consideration of forced sales also renders it incompetent for either party to put in evidence the amount paid by the condemnor to the owners of neighboring lands taken at the same time, and

as part of the same proceedings, however similar they may be to that in controversy (irrespective of whether the payment was made as the result of a voluntary settlement, an award, or the verdict of a jury). The rights of an owner to recover just compensation for the taking of his land are not to be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation which may have induced others to part with the title to their real estate, or to relinquish claims for damages by reason of injuries thereto. It would be equally unwise, unjust and impolitic to make it impossible for a condemnor which has taken land by eminent domain to compromise the claims of one owner without furnishing evidence against itself in all similar claims. If a sale is made to a condemnor that is about to institute proceedings if it cannot acquire the land by purchase at a satisfactory price, the amount paid is not a fair test of market value. . . ."

The cases cited by the petitioner for the proposition that rules of evidence excluding certain proofs or producing certain presumptions constitute improper classifications are distinguishable from the situation now under consideration. Petitioner's cases all are based upon exclusionary or presumptive rules that determine the ultimate legal conclusion. For example, the constitutional provision in *Carrington v. Rash, et al.* 380 U.S. 89, 13 L.ed. 2d 675, 85 S.Ct. 775 (1965), prohibited, as a class, members of the military from voting in Texas if they moved to Texas in the course of their military duty. This Court held that this provision violated the Equal Protection Clause of the Fourteenth Amendment because it conclusively determined an unreasonable legal result.

Likewise in *Schlesinger, et al. v. Wisconsin,* 270 U.S. 230, 70 L.ed. 557, 46 S.Ct. 260 (1925), this Court held that a Wisconsin statutory provision, which conclusively determined that all gifts made within six years prior to death of

the donor were, for tax purposes, made in anticipation of death, was invalid as an arbitrary classification in conflict with the Fourteenth Amendment. The statute completely shut out from the party affected a reasonable opportunity to present facts relevant to his assertions, and instead, effectively and conclusively determined the legal result.

The criminal cases petitioner relies upon are also concerned with presumptions from a proven fact which lead directly to an ultimate legal conclusion. Both *Tot v. United States*, 319 U.S. 463, 87 L.ed. 1519, 63 S.Ct. 1241 (1943), and *Leary v. United States*, 395 U.S. 6, 23 L.ed. 2d 52, 89 S. Ct. 1532 (1969), are concerned with setting guidelines for testing the validity of a statutory presumption which authorizes the jury to infer necessary elements of a crime from the mere uncontroverted proof of possession of certain items. That this is a misplaced concern in the instant case is readily evident.

In the case now at bar, the exclusionary rule bars only evidence which is of questionable probative value. The rule does not prevent the normal introduction of expert opinion evidence or expert opinion evidence based upon fair market sales, — actual sales between competing buyers and sellers, who are dealing with their own money and who are dealing in properties that are in market competition with other properties.

CONCLUSION

For the reasons stated, this court should deny peitioner's prayer for the issuance of a writ of certiorari to the Supreme Court of Wisconsin, for review and reversal of *Kirkpatrick v. State (Department of Natural Resources)*, (1971), 53 Wis. 2d 522, 192 N.W. 2d 856.

Respectfully submitted,

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APPENDIX A

(Sec. 32.19 Wis. R.S. [1967])

32.19 Additional items payable. The following items shall be compensable in eminent domain proceedings where shown to exist:

(1) REALIGNMENT OF PERSONAL PROPERTY. The cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access.

(2) REMOVAL OF PERSONAL PROPERTY TO ANOTHER SITE. The cost of removal from the property taken to another site of personal property of land owners, or tenants under an existing unexpired written lease, the full term of which is at least 3 years. Such costs shall not exceed $150 for removals from each family residential unit or $2,000 from each farm or nonresidential site.

(3) REFINANCING COSTS. All costs incurred by the owner to finance the purchase of another property substantially similar to the property taken provided that: 1) At the time of the taking the land condemned was subject to a bona fide mortgage or was held under a vendee's interest in a bona fide land contract, and 2) such mortgage or land contract had been executed in good faith prior to the date of the relocation order in condemnation under s. 32.05 or determination of necessity of taking in condemnation under s. 32.06. Such costs shall include:

(a) Reasonable fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking if actually incurred.

(b) Increased interest cost, if any, above that provided in the former financing. The computation of the increased interest costs, if any, shall be based upon and limited to:

1. A principal amount of indebtedness not to exceed the unpaid debt at the date of taking.

2. A term not to exceed the remaining term of the original mortgage or land contract at the date of taking.

3. An interest rate not to exceed the prevailing rate charged by mortgage lending institutions doing business in the vicinity.

4. The present worth of the future payments of increased interest computed at the same rate of interest as in subd. 3.

(4) NET RENTAL LOSS. Net rental losses resulting from vacancies during the year preceding the taking of the property, provided that (a) such loss is limited to the amount that exceeds the average annual rental losses caused by vacancies during the first 4 years of the 5-year period immediately preceding the taking; and (b) such rental loss was caused by the proposed public land acquisition.

(5) EXPENSE OF PLANS RENDERED UNUSUABLE. Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

APPENDIX B

(Sec. 32.19, Wis. Stats. as amended by
Chs. 103 and 244, Laws of 1971)

32.19 (1) The legislature declares that it is in the public interest that persons displaced by any public project be fairly compensated by payment for the property acquired and other losses hereinafter described and suffered as the result of programs designed for the benefit of the public as a whole; and the legislature further finds and declares that, notwithstanding ch. 275, laws of 1931, or any other provision of law, payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements. If the public improvement is funded in whole or in part by a nonlapsible trust, the relocation payments and assistance constitute a purpose for which the fund of the trust is accountable.

(2) DEFINITIONS. In this section and ss. 32.25 to 32.27:

(a) "Person" means:

1. Any individual, partnership, corporation or association which owns a business concern; or

2. Any owner, part owner, tenant or sharecropper operating a farm; or

3. An individual who is the head of a family; or

4. An individual not a member of a family.

(c) "Displaced person" means any person who moves from real property or who moves his personal property from real property, on or after July 1, 1970, as a result of the acquisition of such real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this

chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation, or, who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after the effective date of this amendment (1971) as a direct result of any project or program undertaken under title I of the federal housing act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the federal demonstration cities and metropolitan development act of 1966.

(d) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease or rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

2. For the sale of services to the public;

3. By a nonprofit organization; or

4. Solely for the purpose of sub (3) for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(e) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(f) "Comparable dwelling" means one which, when compared with the dwelling being taken, is substantially equal concerning all major characteristics and functionally equivalent with respect to: the number of rooms, area of living space, type of construction, age, state of repair, type of neighborhood and accessibility to public services and places of employment. "Comparable dwelling" shall meet all of the standard building requirements and other code requirements of the local governmental body and shall also be decent, safe and sanitary as defined by the department of local affairs and development and the department of industry, labor and human relations, jointly.

(3) RELOCATION PAYMENTS. Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation under this chapter may be exercised, shall make fair and reasonable relocation payments to displaced persons, business concerns and farm operations under this section. The following items shall be compensable in eminent domain proceedings where shown to exist. Payments shall be made as follows:

(a) The condemnor shall compensate a displaced person for his actual and reasonable expenses in moving himself, his family, his business or his farm operation, including personal property; actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property; and actual reasonable expenses in searching for a replacement business or farm.

(b) 1. Any displaced person who moves from a dwelling and who elects to accept the payments authorized by this

paragraph in lieu of the payments authorized by par. (a) may receive a moving expense allowance, determined according to a schedule established by the condemnor not to exceed $300 and dislocation allowance of $200.

2. (intro.) Any displaced person who moves or discontinues his business or farm operation and who elects to accept payment authorized under this paragraph in lieu of the payment authorized under par. (a), may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall not be less than $2,500 nor more than $10,000. In the case of a business, no payment shall be made under this subsection unless the condemnor is satisfied that the business:

(b). Is not part of a commercial enterprise having at least one other establishment, not being acquired by the condemnor which is engaged in the same or similar business. For the purpose of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before payment of federal, state and local income taxes, during the 2 taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as the condemnor determines to be more equitable for establishing such earnings. "Average annual net earnings" includes any compensation paid by the business or farm operation to the owner, his spouse or his dependents during such 2-year period. To be eligible for the payment authorized by this subsection, the business or farm operation shall make its state and federal income tax returns available and its financial statements and accounting records available for audit to determine the payment authorized by this subsection.

(c) *Optional payment for businesses.* Any displaced person who moves his business, and elects to accept the payment authorized in par. (a), may, if otherwise qualified under par. (b) 2, elect to receive the payment authorized under par. (b) 2, minus whatever payment he received under par. (a), if he discontinues his business within 2 years of the date of receipt of payment under par. (a), provided that he has suffered a substantial loss of existing patronage. In no event shall the total combined payment be less than $2,500 nor more than $10,000.

(4) REPLACEMENT HOUSING. (a) *Owner-occupants.* In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed $15,000, to the owner of real property acquired for a project which property is improved by a dwelling actually owned and occupied by the owner for not less than 180 days prior to the initiation of negotiations for the acquisition of the property. For the purposes of this paragraph, a nonprofit corporation organized under ch. 181 may, if otherwise eligible, be considered a displaced owner. Such payment includes only the following:

1. The amount, if any, which when added to the acquisition payment, equals the reasonable cost of a comparable replacement dwelling which is decent, safe and sanitary as determined by the department of local affairs and development and the department of industry, labor and human relations jointly, reasonably accessible to public services and places of employment and available on the private market.

2. All expenses incurred by the owner to finance the purchase of another property substantially similar to the property taken provided that: a) at the time of the taking the land

condemned was subject to a bona fide mortgage or was held under a vendee's interest in a bona fide land contract; and b) such mortgage or land contract had been executed in good faith not less than 180 days prior to the initiation of the attempt to purchase such property. Such expenses shall include reasonable incidental fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking if actually incurred, and increased interest cost above that provided in the former financing. The computation of the increased interest costs shall be based upon and limited to:

a. A principal amount of indebtedness not to exceed the unpaid debt at the date of taking.

b. A term not to exceed the remaining term of the original mortgage or land contract at the date of taking.

c. An interest rate not to exceed the prevailing rate charged by mortgage lending institutions doing business in the vicinity.

d. The present worth of the future payments of increased interest computed at the prevailing interest rate paid on savings deposits by commercial banks doing business in the vicinity.

3. Payment under this section shall be made only to a displaced owner who purchases and occupies a decent, safe and sanitary replacement dwelling not later than one year after the date on which he moves from the dwelling acquired for the project, or the date on which he receives payment from the condemnor, whichever is later.

(b) *Tenants and certain others.* In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment to any individual or family displaced from

any dwelling not eligible to receive a payment under par. (a) which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to the initiation of the attempt to purchase such property. For purposes of this paragraph, a nonprofit corporation organized under ch. 181 may, if otherwise eligible, be considered a displaced tenant. Such payment shall be either:

1. The amount which is necessary to enable such person to lease or rent for a period not to exceed 4 years a decent, safe and sanitary dwelling meeting standards established by the department of local affairs and development and the department of industry, labor and human relations, jointly, and adequate to accommodate such individual or family in area not generally less desirable in regard to public utilities, public and commercial facilities and places of employment, but not to exceed $4,000; or

2. The amount necessary to enable such person to make a downpayment, including incidental expenses described in par. (a) 2, on the purchase of a decent, safe and sanitary dwelling meeting standards established by the department of local affairs and development and the department of industry, labor and human relations, jointly, and adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities, public and commercial facilities and places of employment, but not to exceed $4,000, but if the amount exceeds $2,000, the person must equally match the excess over $2,000 in making the downpayment.

(c) *Expenses incidental to transfer of property.* In addition to amounts otherwise authorized by this chapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:

1. Recording fees, transfer taxes and similar expenses incidental to conveying such property.

2. Penalty costs for prepayment of any mortgage entered into in good faith encumbering such real property if the mortgage is recorded or has been filed for recording as provided by law prior to the date specified in par. (a) 2.

3. The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of besting of title in the condemnor or the effective date of possession of such real property by the condemnor, whichever is earlier.

4. The cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access.

5. Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

6. Reasonable net rental losses where a) the losses are directly attributable to the public improvement project and b) such losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.

7. Cost of fencing reasonably necessary pursuant to s. 32.09 (6) (g) shall, when incurred, be payable in the manner described in s. 32.20.

(d) No payments received under this section shall be considered as income for the purposes of ch. 71; nor shall such payments be considered as income or resources to any recipient of public assistance and such payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under any welfare law.

(5) EMINENT DOMAIN. Nothing in ss. 32.19 or 32.25 to 32.27 shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages.